Supreme Court, U.S.
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No. 96-419

In The

Supreme Court of the United States

October Term, 1996

LEE JETER BROCK, Guardian Ad Litem for ELIZABETH H. HARDY, a minor, and LEE JETER BROCK, Individually,

Petitioners,

v.

FORREST RAY LEWIS, JAN LEWIS and LUCY LEWIS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Respondents submit that the questions presented for review can be simplified as follows:

1. Did the lower courts impermissibly find facts when considering the Respondents' Motion to Dismiss for lack of subject matter jurisdiction?

2. Did the lower courts properly apply the tests for admiralty jurisdiction as enunciated by this Court in *Jerome B. Grubart v. Great Lakes Dredge and Dock Co*?

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RESPONDENTS' BRIEF IN OPPOSITION

The Respondents hereby oppose the Petition For A Writ Of Certiorari.

I. MISSTATEMENTS OF LAW AND FACT

Central to the Petitioners' request to this Court that the decision below be reviewed is their assertion that a Rule 12(b)(1) "motion to dismiss an action for want of subject matter jurisdiction may be granted *only* if it appears beyond a doubt that the plaintiff can prove no set of facts in support of her claim which would entitle her to relief." (Petition at page 5) (emphasis added). In support of this statement of the law, the Petitioners grossly miscite the case of *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed. 2d 80 (1957). (Petition at page 5). Obviously, the Petitioners are setting forth the standard with regard to a Motion to Dismiss for failure to state a claim filed pursuant to Rule 12(b)(6), not the standard concerning a Motion to Dismiss for lack of subject matter jurisdiction filed pursuant to Rule 12(b)(1). *See* 355 U.S. at 45, 78 S.Ct. at ___, 2 L.Ed. 2d at 84 ("in appraising the sufficiency of the Complaint we follow, of course, the accepted Rule that a Complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.").

Moreover, it must be kept in mind that federal courts are courts of limited jurisdiction and the Petitioners had the burden of proving jurisdiction was proper in this case. *See Growth Horizons, Inc. v. Delaware County, Pa.*, 784 F.Supp. 258, 260 (E.D. Pa. 1992), *rev'd on other grounds*, 983

F.2d 1277 (3rd Cir. 1993) (citations omitted). In considering the Rule 12(b)(1) Motion contesting subject matter jurisdiction, it was incumbent upon the district court below to find facts and, indeed, resolve factual disputes – not to assume jurisdictional allegations as true as the Petitioners urge. *Compare Hair v. Tennessee Consol Retirement System*, 790 F.Supp. 1358, 1362 (M.D. Tenn. 1992) (citing *Rogers v. Stratton Industries, Inc.*, 798 F.2d 913, 918 (6th Cir. 1986) ("The Court has a duty to resolve any factual disputes on a Rule 12(b)(1) motion.") *with* Petitioners' Brief at page 3 ("Accepting this set of facts [as alleged in the Complaint] as true, there is sufficient evidence to support a claim sounding in admiralty.").

When analyzing a motion such as the one presented in this case, it is settled that "the court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction to hear the action." 2A MOORES FEDERAL PRACTICE ¶ 12.07[2.-1] (citing *Land v. Dollar*, 330 U.S. 731, 67 S.Ct. 1009, 91 L.Ed. 1209 (1947)); *See also Growth Horizons, Inc. v. Delaware County, Pa.*, 784 F.Supp. at 260 (quoting *Mortensen v. First Federal Savings and Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977) ("the court is free to weigh the evidence and satisfy itself as to the existence or not of its power to hear the case.") and (citing *Haase v. Sessions*, 835 F.2d 902, 908 (D.C. Cir. 1987)). Moreover, below, the court of appeals was required to "accept the District Court's factual findings on jurisdictional issues unless clearly erroneous." *Delta Country Ventures, Inc. v. Magana*, 986 F.2d 1260, 1262 (9th Cir. 1993) (citation omitted).

Recognizing that the district court was faced with the situation of determining the issue of subject matter jurisdiction, the Petitioners responded to the Motion to Dismiss by supplying the district court with the affidavit of the minor plaintiff, Elizabeth H. Hardy. (*See* Attachment to Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss, filed with the district court May 24, 1995 (hereinafter "Hardy Affidavit")). In that regard, the Petitioners now misstate the facts by not fully and completely referring this Court to all matters presented to and upon which the lower courts properly relied in determining that there was no admiralty jurisdiction in this particular matter.

In considering the activity which was taking place upon the Respondents' private floating pier, it should be understood that the Petitioner, Elizabeth Hardy, (hereinafter "Elizabeth") was fourteen (14) years old and the Respondent, Lucy Lewis, (hereinafter "Lucy") was thirteen (13) years old at the time. (*Id.* at 1.) Further, Elizabeth has averred that the activity which gave rise to her injuries occurred as follows:

> At the time the injuries were sustained, I dove from the Defendants' floating dock into the navigable channel of the IntraCoastal Waterway at the command, direction and urging of captain LUCY LEWIS who was then the captain and operator of the vessel that was underway in the navigable channel of the IntraCoastal Waterway and onto which I was in the process of boarding.
>
> At the time I dove from the floating dock into the IntraCoastal Waterway, the Wave Runner was approximately ten to fifteen feet from the floating dock at a forty-five degree angle from

> the floating dock to my right and into the inland [sic] waterway. The Wave Runner was not adjacent to the floating dock. I dove directly into the IntraCoastal Waterway between the two pilings on the floating dock that were closest to the channel of the IntraCoastal Waterway. The dive was perpendicular to the actual channel of the IntraCoastal Waterway.

(Hardy Affidavit at page 3). Also relevant to this activity and regarding Lucy's knowledge, experience and prior operation of Elizabeth's wave runner, Elizabeth further stated:

> LUCY LEWIS, on occasions prior to the date of the accident, had captained the Wave Runner, conditioned upon me being a passenger and only if both were vested. That prior to the time that LUCY LEWIS donned the Wave Runner vest and boarded the vessel, starting same and becoming captain of same and operating same into the IntraCoastal Waterway, the boat had been properly secured and docked to the floating dock by me and turned off.

(*Id*). Finally, with regard to Elizabeth's prior experience with getting on the Wave Runner at the Respondent's floating dock, she stated:

> LUCY LEWIS's floating dock was my first experience of diving from a floating dock and utilizing said floating dock for the docking of a vessel. I had docked the vessel on a number of occasions during the prior six (6) weeks in the same or similar manner. However, *on all prior occasions*, both LUCY LEWIS, as the captain of the vessel and me as passenger, had utilized the boarding process of stepping from the floating

> dock directly onto the vessel without entering the navigable waters of the IntraCoastal Waterway.

(*Id.* at 3-4) (emphasis added).[1]

II. REASONS WHY PETITION SHOULD BE DENIED

With the law governing the consideration of the Rule 12(b)(1) motion correctly stated and the facts fully disclosed, it is apparent that neither of the Petitioners' arguments for the issuance of a Writ of Certiorari has any merit.

A. THE COURTS BELOW PROPERLY APPLIED THE FACTS TO THE LAW.

The District Court and Fourth Circuit Court of Appeals below found that under the facts presented for consideration by the Petitioners, Elizabeth was not engaged in an act of boarding a vessel when she was injured. (Appendix at 46 and 55). Rather, as the Court of Appeals concluded, Elizabeth was engaged in recreational diving and swimming. (Appendix at page 55). The Petitioners' only argument to the contrary is that the

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[1] While it is not relevant to the questions presented by the Petitioners, they further misstate the facts of this case by stating in the Statement of Facts that the Wave Runner was duly registered under North Carolina Law. There is no reference made by the Petitioners to the record where such registration can be found and such evidence is not in the record. (*See* Petition at page 2).

courts reviewing this matter must accept their characterization of the activity as "boarding" and, for jurisdictional purposes, that is the end of the inquiry. (Petition at pages 3-4). However, as set forth above, the courts below were required to determine jurisdictionally relevant facts. Each court correctly determined that the activity giving rise to Elizabeth's injury was not such that there existed a substantial relationship to traditional maritime activity. Each court properly concluded that admiralty jurisdiction did not exist in this matter. (Appendix at page 55). We are not in Wonderland and the Petitioners are not Humpty Dumpty paying the word "boarding" to mean what they say it means. The decision by the Court of Appeals for the Fourth Circuit is proper and the Petition for a Writ of Certiorari should be denied.

B. NO CONFLICT WITH *JEROME B. GRUBART v. GREAT LAKES DREDGE AND DOCK CO.*

This Court in *Jerome B. Grubart, Inc. v. Great Lakes Dredge and Dock Co.*, ___ U.S. ___, 115 S.Ct. 1043, 130 L.Ed. 2d 1024 (1995), reaffirmed two tests for determining admiralty jurisdiction, the location test and the connection or nexus test. *Id.* U.S. at ___, 115 S.Ct. at 1048. With regard to the connection test, this Court in *Grubart* held that the reviewing court "first, must 'assess the general features of the type of incident involved' to determine whether the incident has 'a potentially disruptive impact on maritime commerce' ". *Id.* (citation omitted). There is a second aspect of the connection test which must be satisfied and the reviewing court, also, "must determine whether 'the general character' of the 'activity giving rise

to the incident' shows a 'substantial relationship to traditional maritime activity' ". *Id.* (citation omitted).

It is thus obvious that the lower courts are burdened with the task of finding facts and determining, first, the general features of the incident involved and, second, the general character of the activity giving rise to the incident in order to determine whether or not the incident in question satisfies the connection test for admiralty jurisdiction. The Petitioners argue that Elizabeth was injured while engaged in a traditional maritime activity, "boarding", and, thus, the connection test is satisfied and admiralty jurisdiction applies. (Petition at page 8). However, again, the Petitioners' argument is premised on their erroneous assumption that the court may only consider their characterization of the "facts" as stated in their Complaint and cannot engage in any fact finding when determining the existence of admiralty jurisdiction *vel non*. As discussed above and as this Court held in *Grubart*, the lower courts correctly considered the 12(b)(1) Motion to Dismiss in this case. As the Fourth Circuit Court of Appeals held, "[i]t stretches reality to believe that Elizabeth's plan to board the wave runner – assuming that was the purpose of her dive – was sufficient to create a substantial relationship to traditional maritime activity." (Appendix at page 55).

The Fourth Circuit Court of Appeals carefully and properly followed this Court's mandate and properly applied the tests as set forth in *Grubart*. There is no conflict between that application of fact to law and this Court justifying intervention. The Petition for Certiorari should be denied.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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